87-1837

No. 87-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented

1. Has New York City deprived an owner of property without due process where the City prepared and published a zoning map, encouraged the public to rely upon that map, distributed that map to the municipal officials responsible for administering its zoning laws as the only tool available to those officials for identifying zoning district boundaries when they review applications for building permits, issued a building permit for a 31-story building on the basis of that map, decided thereafter that its map was wrong, and then waited seven months, *i.e.*, until after the owner had topped off its 31-story building, before notifying the owner of the "error" and directing it to remove the building's top twelve stories?

2. May New York City shield itself from the constitutional requirements of due process by asserting that its officials' actions are *ultra vires* and not subject to principles of equitable estoppel?

3. May New York's highest court properly avoid adjudicating appellant's claim that its right to due process has been violated by characterizing that claim as premature?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. Appellant has no parent companies, subsidiaries or affiliates as those terms are used in Supreme Court Rule 28.1.

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

This appeal is from a final order (Appendix 1) of the Court of Appeals of the State of New York. That order is based upon an opinion (Appendix 2) that is reported officially at 71 N.Y.2d 274 and unofficially at 519 N.E.2d 1372 and 525 N.Y.S.2d 176. The order affirmed an order of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York (Appendix 3) that is reported officially at 129 A.D.2d 405 and unofficially at 513 N.Y.S.2d 342. The Appellate Division's order was not accompanied by an opinion but recited that it was based upon "the reasons stated by" the lower court.

The court of first instance, *i.e.*, the Supreme Court of the State of New York, County of New York, issued a "Decision and Judgment" (Appendix 4) that is not reported. The judgment refused to disturb a resolution (Appendix 5) of appellee Board of Standards and Appeals (the "BSA") and a written determination (Appendix 6) of appellee Commissioner of Buildings, neither of which is reported.

Jurisdiction

This litigation was brought pursuant to Article 78 of New York's Civil Practice Law and Rules ("CPLR"), which governs proceedings to review the actions of public bodies and officers. The litigation challenges a determination of the Commissioner of Buildings and a resolution of the BSA. The Commissioner's determination (a) partially revoked a building permit that had been granted to appellant several months previously for a 31-story building (a building that, in the meantime, appellant already had largely constructed) and (b) directed appellant to remove the building's top twelve stories. The BSA's resolution sustained the Commissioner's determination.

The Supreme Court, New York County, dismissed appellant's petition, and the Appellate Division affirmed. On February 9, 1988, the Court of Appeals also affirmed, and on April 28, 1988, it denied reargument.

Appellant now appeals to this Court pursuant to 28 U.S.C. § 1257(2) on the ground that New York's highest court has rendered a final decree in which it has rejected a claim that provisions of New York City's Administrative Code and its Zoning Resolution have been applied to appellant in a manner that is repugnant to the Constitution of the United States. The notice of appeal (Appendix 7) was filed with the Court of Appeals and the court possessed of the record on May 6, 1988. The appeal is being docketed in this Court within 90 days of the order appealed from.

Constitutional and Statutory Provisions

1. Fourteenth Amendment, United States Constitution:

   > No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law . . . .

2. New York City Administrative Code § C26-118.7 (now recodified as § 27-197):

   > The commissioner [of buildings] may revoke any permit . . . whenever any permit has been issued in error and conditions are such that the permit should not have been issued.

3. Relevant provisions of the New York City Zoning Resolution are annexed hereto as Appendix 8.

Statement of the Case

Kafka wrote the facts of this case. In accordance with its regular procedures and after meticulous and lengthy review of the underlying building plans, the City of New York issued to appellant a permit authorizing the construction of a 31-story building. At that time, appellant and the officials who issued its permit believed that the permit conformed with the City's zoning ordinance. Proceeding in good faith, appellant then commenced and largely completed construction, topping the building off at 31 stories.

At that point, after several months of construction, the City revoked appellant's permit to the extent that it authorized construction above the 19th floor, and it directed appellant to remove the building's top twelve stories. According to the City, its own zoning map, *i.e.*, the map expressly incorporated in the City's zoning ordinance, which was the map on which appellant's architects *and* the officials who issued appellant's permit had relied, contained an error: it failed to show that a zoning district boundary that appeared to be perfectly straight for

nearly two miles actually contains a small protuberance that juts out for 50 feet at appellant's block, so that most of appellant's property is inside a special district in which construction may not exceed 19 stories. To compound the injustice, although the City noticed the "error" on its map at about the time that appellant was commencing construction, it waited at least seven months (during which time appellant nearly completed the building) before notifying appellant of the "error."

This building would be indisputably legal if it could be moved a mere 50 feet, but all construction above the 19th floor has been halted since 1986. The City insists that it is entitled to the strict enforcement of its zoning laws, and New York's highest court has agreed. The facts are set forth below in detail.

A. The Parties

Appellant, Parkview Associates, is a limited partnership. It owns the real property (the "Property") at 108 East 96th Street in Manhattan.

Appellees include the City of New York and various agencies thereof. The Department of Buildings is responsible for examining plans for the construction of buildings, determining whether such plans conform with the City's zoning ordinance, and issuing permits for construction. The Commissioner of Buildings is the Department's chief officer. The BSA hears appeals from determinations made by the Commissioner.

The remaining appellee, Civitas Citizens, Inc. ("Civitas"), is an intervenor in the litigation. It characterizes itself as "a membership organization devoted to preserving and enhancing the quality of life on the upper east side of Manhattan," and it claims that its members "have suffered a degradation in the quality of the urban environment in which they reside, including a loss of light and air, . . . by reason of the construction" of appellant's building.

B. The Property

The Property is a rectangular lot on the south side of East 96th Street, between Park and Lexington Avenues. Its frontage along 96th Street extends for 100 feet, from 90 feet east of Park

Avenue eastward to 190 feet east of Park Avenue. An affiliate of appellant acquired the Property in 1982, at which time it was vacant.

C. The Zoning Resolution, the Zoning Maps and the Procedures for Amending Them

New York City's zoning ordinance is entitled the "Zoning Resolution." It is a massive document, more than 900 pages in length. It has been published by the City's Department of City Planning in a looseleaf format that can be updated to reflect changes. That looseleaf format is used by all owners and professionals who require reference to the City's zoning laws; it is the only codification in existence; and it is the only version available to and used by the personnel of the Department of Buildings, which is the agency principally responsible for administering and enforcing zoning law in New York City.

The Zoning Resolution also contains 125 "zoning maps" that are intended to depict the boundaries of the various zoning districts created by the ordinance. These maps are physically bound with the Zoning Resolution and are expressly incorporated in it under the plain and unambiguous language of the statute. Thus, Zoning Resolution § 11-14 provides:

> The location and boundaries of the districts established by this resolution are shown upon the zoning *maps*, which are hereby incorporated into the provisions of this resolution. The said *zoning maps* in their entirety, including all amendments thereto, shall be as much a part of this resolution as if fully set forth and described herein.

(Emphasis in original.) Except for these zoning maps and the statute's rules for construing them, there is nothing in the Zoning Resolution that identifies the location of zoning district boundaries. The particular zoning map on which the Property appears is known as "map 6b."

The zoning maps are subject to amendment under City Charter § 197-c, pursuant to which proposed zoning legislation is prepared by the Department of City Planning (which provides staff assistance to the City Planning Commission [*see* Charter § 191(b)(3)]) and eventually approved, disapproved or modi-

fied, after public hearings, by the Board of Estimate. When the Board of Estimate acts, it does so by adopting "resolutions" that we refer to as "enabling resolutions" to distinguish them from the Zoning Resolution itself. These enabling resolutions describe the changes to be made to district boundaries in words (or by "metes and bounds"), but neither these enabling resolutions nor the "metes and bounds" descriptions contained therein appear in the Zoning Resolution—except to the extent that the Department of City Planning subsequently translates them into changes to the visual depictions of the zoning districts on the zoning maps that are incorporated in the Zoning Resolution.

When the enabling resolutions are considered by the Board of Estimate, they are accompanied by (and expressly refer to) diagrams that have been prepared by the Department of City Planning and certified by the City Planning Commission. These diagrams depict the zoning of the relevant area once the proposed amendment has been promulgated. The diagrams are maps, but they are not the "zoning maps" incorporated in the Zoning Resolution.

D. The PI District

In 1973, the Board of Estimate established a Special Park Improvement District (the "PI District") on Manhattan's Upper East Side, in the vicinity of Fifth, Madison and Park Avenues between East 60th and 96th Streets. The maximum height of buildings in the PI District may not exceed the lesser of 210 feet or 19 stories. Zoning Resolution § 92-06. When the PI District was established, its eastern boundary, generally and at 96th Street in particular, was 150 feet east of Park Avenue.

The Property is thus at the *extreme* corner of the district, and there are several high-rise buildings in the vicinity.

E. The Redrawing of the PI District's Boundaries and the Revisions to Zoning Map 6b

On March 3, 1983, the Board of Estimate adopted an enabling resolution whose text (1) described in words changes to be made in the PI District's boundaries and (2) expressly stated

that those changes where "as shown on a diagram dated October 25, 1982." The "metes and bounds" description in the text of the Board's resolution did not refer to any change in the boundary at 96th Street, which had been 150 feet east of Park Avenue. But the accompanying certified diagram unequivocally showed that boundary to be 100 feet east of Park Avenue. There was, thus, an inconsistency between the "metes and bounds" description in the text of the enabling resolution and the visual depiction on the certified diagram incorporated in that resolution.

After the Board of Estimate's action, the Department of City Planning, *i.e.*, the agency that had prepared both the Board of Estimate's enabling resolution *and* the certified diagram incorporated therein, revised the relevant zoning maps to reflect the legislation of March 3, 1983. Accordingly, in the spring of 1983, it published a new version of zoning map 6b for inclusion in the Zoning Resolution. This new map 6b contained no printed number to indicate the distance between Park Avenue and the PI District's eastern boundary at 96th Street. Therefore, under the express terms of Zoning Resolution § 76-131(c), this new map, unlike the prior version of map 6b, depicted that boundary as located *100 feet* east of Park Avenue.[1]

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1 In most cases, the zoning maps show the precise location of zoning district boundary lines by specifying, near the boundary, the number of feet between that boundary and the nearest street. The Zoning Resolution also contains provisions (§ 76-11, *et seq.*) that govern those instances in which no such dimensions are specified on the maps. One of these statutory provisions expressly governing interpretation of the zoning maps, *i.e.*, Zoning Resolution § 76-131(c), provides in pertinent part as follows:

> In cases where a boundary line extends parallel to the short dimension of the block [*i.e.*, in the present case, parallel to Park Avenue] and no dimensions are shown, such boundary line *shall be considered to be located*:
>
> • • •
>
> (c) In the case of all other districts, 100 feet from the nearest *street* within the district [*i.e.*, in the present case, 100 feet from Park Avenue].

(Emphasis added in part.) The Zoning Resolution also provides, in § 12-01(c), that "[t]he word 'shall' is always mandatory and not discretionary."

On May 24, 1984, moreover, the Board of Estimate approved additional legislation affecting zoning map 6b. Like the legislation of March 3, 1983, it included a diagram certified by the City Planning Commission that clearly depicted the PI District's boundary as 100 feet from Park Avenue at 96th Street. After this legislation had been approved, the Department of City Planning prepared a further revision of zoning map 6b that thereafter was distributed for inclusion in the Zoning Resolution. Like its immediate predecessor, this version of map 6b contained no printed number to identify the PI District's dimensions at 96th Street; it thus depicted the district's 96th Street boundary as 100 feet east of Park Avenue.

This version of zoning map 6b remained the current version in circulation—*i.e.*, the version in all properly updated copies of the Zoning Resolution published by the Department of City Planning—until December of 1985.

F. Appellant's Application for a Building Permit and Its Reliance on Zoning Map 6b

At the end of 1984, appellant instructed its architects to prepare plans for a condominium apartment building to be constructed on the Property. The architects filed their initial set of plans with the Department of Buildings in the spring of 1985.

At that time, had zoning map 6b shown the PI District's eastern boundary, at 96th Street, to be 150 feet (rather than 100 feet) from Park Avenue, appellant's architects could have designed, and appellant would have constructed, a wider building that did not exceed 19 stories in height, and that contained 100,000 square feet of space—as opposed to the 78,000 square feet that will remain if appellant removes the top twelve stories of its existing building.

At all relevant times in 1984 and 1985, however, zoning map 6b showed the PI District's eastern boundary, at 96th Street, at *100 feet* east of Park Avenue. Therefore, all building plans submitted to the Department of Buildings on appellant's behalf were prepared in the belief that that was the boundary's location.

G. The Scrutiny of Appellant's Plans by the Department of Buildings and Civitas, and the Issuance of Its Permit

In July of 1985, appellant's architects submitted for review by the Department of Buildings revised plans for a 31-story building, with a ten-foot-wide setback above the 19th story so that the building's height would be limited to 19 stories on the portion of the Property within 100 feet of Park Avenue.

As required by the applicable statute (New York City Administrative Code § C26-118.1, now recodified as § 27-191) and the Buildings Department's written internal directives, all of appellant's plans were scrutinized painstakingly by a Buildings Department examiner who was a civil engineer, who admittedly was responsible for "examining applications for zoning purposes," who specifically reviewed zoning map 6b, and who raised *numerous* zoning objections to aspects of appellant's plans—none of which involved the location of the PI District's boundary. The examiner plainly shared the understanding of appellant's architects that the PI District's eastern boundary was 100 feet from Park Avenue at 96th Street.

On August 12, 1985, after appropriate adjustments had been made to the plans to eliminate the examiner's objections, the Department of Buildings approved the revised plans as conforming with all zoning requirements. On September 24, 1985, it issued an excavation and foundation permit. Excavation commenced in October of 1985 and was completed in November, at which time foundation work commenced. Installation of the foundations was completed later that month.

Throughout the fall of 1985, appellant's building plans were matters of public record, available for inspection at the Department of Buildings. During this time, Civitas and other activist groups admittedly "examined the building plans and discussed them with representatives of the Department of Buildings"—and admittedly concluded that the PI District "stopped 100 feet east of Park Avenue," and that appellant's "proposed building was in full compliance with the Law."[2]

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2 The quotations are from a letter dated July 30, 1986, sent to the Commissioner by one of the activist groups. In a circular dated July 22,

In November of 1985, moreover, the Department of Buildings reviewed appellant's application once more to determine whether appellant's plans complied with applicable zoning requirements. After this review, the Department of Buildings again determined that appellant's plans conformed with all zoning requirements. Two days later, on November 21, 1985, the Department of Buildings issued a full building permit authorizing construction of a 31-story building.

Significantly in view of the furor that subsequent events generated, there never has been *any* contention in this litigation that the permit was procured or influenced by corruption. The City's Office of the Inspector General conducted an investigation into its issuance and found no evidence whatsoever of wrongdoing.

H. The Secret Revision of Zoning Map 6b

At some point in 1985, the Department of City Planning concluded that zoning map 6b did not correctly depict the PI District's boundary at 96th Street. It therefore revised map 6b to show that boundary at 150 feet rather than 100 feet from Park Avenue—a revision that was effectuated by adding the number "150" to the map at the northeastern corner of Park Avenue and 96th Street, thereby eliminating the applicability of Zoning Resolution § 76-131(c).

The Department of City Planning disseminated this revised version of map 6b, however, in a manner that concealed from the public the possibility that the zoning map might previously have contained an error: in December of 1985, the Department of City Planning published a new looseleaf version of the entire 900-page Zoning Resolution, including all 125 or so zoning maps; the revised version of map 6b was published for the first time in this new edition of the Zoning Resolution. The revised

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1986, Civitas acknowledged that, "[s]everal months ago," it had been "alerted to a building being constructed at 108 East 96th Street," had "examined the building plans at the Department of Buildings" and had ascertained that the PI District "extended for *100* feet along 96th Street from Park Avenue" (emphasis in original).

map 6b contained no indication, on the map itself or on its legend, that it differed in any way from the immediately prior version—unlike other occasions, when the Department of City Planning has noted on its maps' legends that the maps reflect corrections or "clarifications." Similarly, the cover page of the new edition of the Zoning Resolution contained no indication that a change had been made on zoning map 6b. In fact, it created the *opposite* impression: it informed subscribers that the revised Zoning Resolution contained "[a]mendments" to 17 specifically enumerated zoning maps; it did *not* include map 6b among those 17 enumerated maps.

No one at the Department of City Planning appears to have called the change to the attention of the Department of Buildings, even though that agency was responsible for administering the Zoning Resolution; no one notified appellant or its architects of the change; no one even tried to determine whether there were pending construction projects or applications, or outstanding building permits, that might be affected by the change—even though the change affected only one block. Because appellant's plans already had been approved, and its permit already had been issued, appellant and its architects had no occasion to consult this new version of map 6b. Therefore, they were not aware of the change.

I. Appellant's Construction Pursuant to Its Permit

After receiving its permit on November 21, 1985, appellant proceeded with construction. By July of 1986, it had spent $7.2 million in actual construction costs, virtually all structural work (including all steel erection work and the installation of bulkheads and plumbing and electrical risers) and substantial mechanical work had been completed, and the building had been topped off at 31 stories.

Throughout this period, neither appellant nor its architects had any inkling that appellant's permit might be infirm. The president of appellant's general partner, who was "the person . . . principally responsible for the basic decisions to purchase the Property and develop it," testified by affidavit as follows:

> I want to assure this Court of the following, and I want to state this as clearly and unequivocally as possible: At no time prior to July of 1986 did I (or anyone else at Parkview or any of its affiliates) have any inkling that there might be anything suspect or infirm about the validity or propriety of the permits and approvals pursuant to which we were constructing the 31-story building on the Property.

In its pleading, which was verified, appellant testified to the same effect. Appellant's chief architect testified that it was not until July of 1986 that he learned that "the relevant boundary . . . purportedly was something other than 100 feet" from Park Avenue.

J. The Partial Revocation of Appellant's Permit

On July 11, 1986, the Department of Buildings suddenly directed appellant to stop work and advised it that its permit would be revoked unless it demonstrated that it was entitled to proceed with construction above the 19th floor. This order was appellant's *first* notice that its permit might be suspect, or that there might be a question as to the location of the PI District's boundary.

By letter dated July 21, appellant explained to the Department of Buildings in detail why its permit was valid. On the next day, July 22, after a purportedly "thorough review" of appellant's submission of the previous day, the Commissioner of Buildings revoked the permit to the extent that it authorized construction above the 19th floor, and directed appellant to submit plans for a building that would not exceed 19 stories. This partial revocation was premised upon New York City Administrative Code § C26-118.7 (now recodified as § 27-297), which provides that the Commissioner "may revoke any permit . . . whenever any permit has been issued in error and conditions are such that a permit should not have been issued."

If appellant complies with this directive and removes the top twelve floors from its building, it will suffer a loss on its investment in the Property that will exceed $9 million.

K. Appellant's Appeal to the BSA

On July 23, 1986, appellant appealed to the BSA, pursuant to City Charter §§ 666(7) and 1806, from the Commissioner's determination. By resolution dated October 14, 1986, the BSA affirmed that determination. In doing so, the BSA considered only one issue (*i.e.*, the correct location of the PI District's boundary "at all relevant dates"), and it expressly declined to "rule on any issue related to a developer's reliance on an erroneously issued permit."

L. This Litigation and Appellant's Assertion of the Questions to Be Reviewed

On October 16, 1986, appellant commenced this proceeding to challenge the BSA's determination and, in addition, to challenge the Commissioner's action on equitable and constitutional grounds that the BSA had disclaimed the power to consider.

Appellant asserted in its petition that the partial revocation of its permit had been improper, because (1) the permit had been issued properly and in conformity with the Zoning Resolution (first cause of action), (2) appellant's right to complete construction pursuant to the permit had vested (second cause of action), (3) the City was estopped from revoking the permit (third cause of action), and (4) the revocation deprived appellant of property without due process of law or just compensation, in violation of appellant's rights under, respectively, the state and federal constitutions (fourth and fifth causes of action). Appellant expressly asserted in its petition that the actions complained of had "deprive[d]" it "of its property without due process of law or just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States."

The City opposed the petition and counterclaimed for an injunction against the maintenance on the Property of a structure that exceeds 19 floors. Civitas also opposed the petition.

In a Decision and Judgment dated November 18, 1986, the court of first instance rejected all of appellant's contentions and dismissed its petition, essentially on the theory that the PI Dis-

trict's boundary was 150 feet from Park Avenue, as a result of which appellant's permit was "invalid when issued and create[s] no rights in petitioner." The court rejected appellant's constitutional claims, and it dismissed the City's counterclaim as premature pending determination of an application by appellant for a zoning variance. No trial was held.

M. Appellant's Application for a Variance

In December of 1986, appellant commenced the procedural steps that are necessary prerequisites to an application to the BSA for a zoning variance. The application itself was filed in May of 1986. The BSA has been unable to hold a hearing on the application, however, because other municipal agencies have failed to complete their review of the draft environmental impact statement that appellant is required to submit to the BSA.

N. The Appeals in This Litigation, and Appellant's Preservation of the Questions to Be Reviewed

Appellant appealed to the Appellate Division from the decision by the court of first instance and, on that appeal, briefed its constitutional claims. By order dated April 2, 1987, the Appellate Division affirmed "for the reasons stated by" the lower court.

Appellant then appealed to the Court of Appeals pursuant to CPLR § 5601(b)(1), which authorizes such appeals "as of right" when the order appealed from "finally determines an action where there is directly involved the construction of the constitution . . . of the United States . . . ." Appellant briefed the constitutional issues in connection with the Court's *sua sponte* review of its subject matter jurisdiction. By order dated July 7, 1987, the Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved."

On August 5, 1987, appellant moved in the Court of Appeals, pursuant to CPLR § 5602(a)(1)(i), for permission to appeal to that Court from the Appellate Division's order. On October 2, 1987, while that motion still was *sub judice*, appellant appealed to this Court, pursuant to 28 U.S.C. § 1257(2), from the order

of the Court of Appeals of July 7, 1987. That appeal was docketed on October 5, 1987. *Parkview Associates v. City of New York, et al.*, No. 87-542.

By order entered on October 20, 1987, the Court of Appeals granted appellant's motion for permission to appeal. That order brought up for review by the Court of Appeals "every reviewable issue" in the case, including the constitutional issues. *Quain v. Buzzetta Construction Corp.*, 69 N.Y.2d 376, 379 (1987). Therefore, in accordance with a stipulation of the parties, the appeal to this Court was dismissed on November 13, 1987.

Appellant briefed its constitutional claims on its appeal to the Court of Appeals, which, on February 9, 1988, affirmed the Appellate Division's decision. The Court held that "the original permit . . . was invalid" and that, therefore, "the . . . BSA action in ratifying the decision of the Commissioner partially revoking [the] permit had a sound legal basis" and, in fact, "there was no discretion reposed in" the Commissioner and the BSA "to do otherwise" than revoke the permit. The Court further held that "the City should not be estopped here from revoking that portion of the building permit," because "estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws . . . even where there are harsh results . . . ."

As to appellant's constitutional claims, the Court's holding, in its entirety, was as follows:

> Finally, Parkview's claim that the City's action constitutes a taking without due process or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance (*see*, *Church of St. Paul v Barwick*, 67 NY2d 510, 519; *see also*, *Scarsdale Supply Co. v Village of Scarsdale*, 8 NY2d 325, 330; *Levitt, Inc. v Village of Sands Point*, 6 NY2d 269, 273). The variance application now pending is, of course, not affected by our decision today.

On April 28, 1988, reargument was denied.

The Questions Presented Are Substantial

I. The City's Revocation, After Appellant's Substantial Reliance, of a Permit Issued in Conformity With the City's Zoning Map Violates Due Process

The New York Court of Appeals has held in this case that the BSA and the Commissioner did not act irrationally in determining that the PI District's boundary is 150 feet from Park Avenue at 96th Street—a proposition of state law. In concluding, however, that the City was entitled to revoke appellant's permit notwithstanding appellant's substantial reliance thereon, the Court below embraced a proposition that is subject to this Court's review—*i.e.*, that appellant was charged at all times with knowledge of (and with the exercise of due diligence could have ascertained) the boundary's actual location.[3]

On the facts of this case, the proposition that appellant was charged with knowledge of the boundary's "correct" location is not consistent with due process. When subjected to scrutiny for conformance with constitutional standards, "an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption." *Texaco, Inc. v. Short*, 454 U.S. 516, 544 (1982) (Brennan, J., dissenting).

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3 The language in the opinion of the Court of Appeals about "due diligence" must be regarded as an expression of the proposition that appellant was charged with knowledge of the boundary's "correct" location—not as a determination that appellant acted unreasonably in relying on the zoning map and its permit. The court of first instance and the Appellate Division (which adopted the lower court's reasoning) expressly refused to make findings as to the reasonableness of appellant's conduct, holding that it was irrelevant as a matter of law. Therefore, there were no lower court findings for the Court of Appeals to affirm on this issue, and as a matter of state constitutional law, the Court of Appeals had no jurisdiction to make its own findings. N.Y. Constitution, Art. 6, § 3; *see also* CPLR § 5501(b). No such finding, even if made, could deprive this Court of jurisdiction to consider appellant's constitutional claim. *See, e.g., United Gas Public Service Co. v. Texas*, 303 U.S. 123, 143 (1938); *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927).

A. Appellant May Not, Consistent With Due Process, Be Charged With Knowledge of the Boundary's "Correct" Location

To charge persons with knowledge of a particular law, due process requires that the government first comply with minimum prerequisites:

> Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.

Texaco, Inc. v. Short, *supra*, 454 U.S. at 532. *See also United States v. Locke*, 471 U.S. 84, 108 (1985); *Hodel v. Irving*, 107 S. Ct. 2076, 2091 (1987) (Stevens, J., concurring).

This Court also has recognized, however, "certain very limited circumstances in which . . . reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution." *Texaco, Inc. v. Short*, *supra*, 454 U.S. at 545 (Brennan, J., dissenting), *citing Lambert v. California*, 355 U.S. 225, 228-229 (1957). There is, the same opinion observes, a "constitutional principle that reliance on the maxim of presumed knowledge of the law is limited by the reasonableness of applying that maxim in a particular class of cases." 454 U.S. at 549.

In the present case, it is unreasonable to charge appellant with knowledge of the location of the PI District's boundary. Appellant simply was denied "a reasonable opportunity to familiarize itself with [the law's] terms and to comply." *Texaco, Inc. v. Short*, *supra*, 454 U.S. at 532.

When appellant's permit was applied for and issued, not only appellant's architects, but also responsible municipal officials and hostile anti-development activists all thought that the boundary was *not* where the Court of Appeals now says that it always was. As drafted, the enabling legislation of March 3, 1983, was internally inconsistent, in that it incorporated a diagram that clearly showed the PI District's boundary to be 100 feet from Park Avenue at 96th Street. After the law's enactment, moreover, the responsible City agencies repeatedly and

systematically represented to the general public, to the City's own officials and to appellant in particular that the law was something different from what the Court of Appeals now has held it to be.

To recapitulate: (1) in 1983, after three public hearings, the Board of Estimate approved enabling legislation containing a diagram that had been certified by the City Planning Commission and approved by the relevant local community board, and that clearly depicted the PI District's boundary at 100 feet from Park Avenue at 96th Street; (2) the Department of City Planning, which had prepared both the enabling resolution and the certified diagram, thereafter revised zoning map 6b to show that boundary at 100 feet from Park Avenue; (3) in 1984, after more public hearings, the Board of Estimate approved additional enabling legislation containing a second diagram that had been certified by the City Planning Commission and approved by the community board, and that again clearly showed the boundary at 100 feet from Park Avenue; (4) the Department of City Planning thereafter again revised map 6b and continued the prior depiction of the boundary; (5) in the spring and summer of 1985, the Department of Buildings meticulously reviewed appellant's plans (which had been prepared on the basis of map 6b), concurred with appellant's architects as to the location of the PI District's boundary and, on August 12, 1985, approved the plans as conforming to all zoning requirements; and (6) in November of 1985, the Department of Buildings again reviewed appellant's plans and issued a building permit.

The reliance by appellant's architects and by everyone else (*i.e.*, the Department of Buildings as well as Civitas) on the zoning map is particularly telling and a testament to the authoritative nature of that document as an integral part of the Zoning Resolution. Since the initial enactment of the Zoning Resolution in 1961, the City has invited property owners to rely on the Zoning Resolution and has provided that document (and only that document) to the officials responsible for administering its zoning laws so that owners, architects and officials need not go back to the various prior actions of the Board of Estimate to ascertain what an owner can lawfully do with his land.

Indeed, it would be simply untenable if, instead of relying on the Zoning Resolution as published by the Department of City Planning, one seeking to design a lawful building had to review *all* relevant Board of Estimate enabling resolutions for *each of the hundreas of Zoning Resolution provisions* with which a building in New York City *must* comply.

In 1961, when the Zoning Resolution was enacted in its present form, the prior zoning statute was overhauled in its entirety. The legislative history of that revision makes clear that the present "one-map system" was devised because it "facilitates easy use of the proposed resolution," *i.e.*, the Zoning Resolution, and "replac[es]" the prior system, which was regarded as "cumbersome," with "a single set of maps *bound with the proposed resolution.*" *Zoning New York City*, p. viii (City Planning Comm'n 1958) (emphasis added). The new system was "designed primarily for the convenience of the potential developer who wants to find out what he can do on a particular plot of land . . . ." *Id.*

By providing for the compilation on published zoning maps of the changes effectuated by successive legislation, the legislators who enacted the Zoning Resolution in 1961 plainly sought to spare owners and their architects the burden and uncertainty of sifting through and comparing the successive "metes and bounds" descriptions contained in such legislation. They no doubt believed that they were promoting simplicity and certainty, and that they were sparing owners the need to retain counsel to ascertain what they could build.[4]

The basic standards of due process "require, among other things, that there be no question as to what actions an individual must take to protect his interests." *United States v. Locke*, *supra*, 471 U.S. at 116 (Powell, J., dissenting). Where, therefore, the applicable statute itself creates sufficient uncertainty, to premise a forfeiture on that statute "violate[s] the standard of certainty and definiteness that the Constitution requires."

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4 The City also has published a book entitled *Zoning Handbook: A Guide to the New York City Zoning Resolution*, which advises the public that "the district in which [any] project is located" may be identified "by referring to the appropriate map" (p. 87).

Id. at 116-117. In the present case, it violates these principles of due process to charge appellant with knowledge that the zoning map was inaccurate, or that the location of the PI District boundary was where it now, after the fact, has been held to be.

B. The City's Failure to Provide Appellant With Prompt Notice of the Map Change Further Violated Due Process

The injustice in the present case is compounded by the City's failure to give appellant prompt notice of the change to map 6b. The Department of City Planning published its revised map 6b in December of 1985, but no notice was given to the public, and no one took the trouble to ascertain whether any outstanding building permits might be affected by a change or clarification in the map's depiction of the PI District's 96th Street boundary. Appellant therefore received no notice of the map change until July of 1986. Under these circumstances, appellant surely cannot be charged, consistent with due process, with knowledge of the boundary's "correct" location during those crucial seven months.

Where a governmental agency is considering action that will affect one's rights adversely, due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As owner of the Property, appellant was entitled to prompt notice of any change in the zoning applicable thereto. Indeed, pursuant to City Charter §§ 197-c(a) and 200(b), the Board of Estimate could not amend the PI District's boundaries without complying with strict notice and public hearing requirements. The Charter's establishment of these procedural safeguards itself demonstrates the legitimacy of an owner's expectation that the zoning applicable to his property will not be changed without notice. *See, e.g., Littlefield v. City of Afton*, 785 F.2d 596, 600 (8th Cir. 1986); *Parks v. Watson*, 716 F.2d 646, 656-657 (9th Cir. 1983); *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709, 714, 727 (D.N.J. 1976).

Precisely what sort of notice due process requires depends in each case upon a balancing of governmental and individual interests. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970). But this Court consistently has held, in a variety of contexts, that due process requires actual *personal* notice where the names and addresses of the persons who will be directly affected by contemplated action are easily ascertainable. *See, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, 56 U.S.L.W. 4302 (U.S. Apr. 19, 1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799 (1983); *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962); *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. at 318.

In the case at bar, appellant's substantial investment in the Property and in its building heavily outweighed the minimal inconvenience to the City that prompt notice of the map change would have entailed. Appellant's investment easily could have been protected by prompt notification of the change, because when the change was made, appellant had not yet incurred significant construction costs. Notice of the change would have given appellant an opportunity to contest it, or redesign its building and avoid the disaster that later befell it.

Furthermore, prompt notice to appellant of the change would *not* have compromised any legitimate municipal interest in the smooth administration of the zoning laws. The map change affected only one block in Manhattan (*i.e.*, 96th Street between Park and Lexington Avenues) and only two property owners (*i.e.*, appellant and the owner of the parcel directly across the street). The inconvenience to the City would have been miniscule.

The belated notice that appellant finally received in July of 1986, when its permit was revoked, was untimely and inadequate, because the permit revocation was premised upon prior action as to which appellant had received *no* notice. "It is . . . fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *quoting from Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In

particular, due process requires that notice be provided "at a time when the deprivation [of property] can still be prevented." *Fuentes*, *supra*, 407 U.S. at 81. That did not happen here.

By reason of the City's failure to provide prompt notice, its subsequent revocation of appellant's permit was effectuated without due process. That revocation should be set aside.

II. The City May Not Shield Itself From the Requirements of Due Process by Claiming That Its Officials' Actions Are *Ultra Vires* and Immune From Principles of Equitable Estoppel

"Municipalities, of course, conduct much of their business of governing through human agents." *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 931 (1988) (Brennan, J., concurring). Therefore, this Court has held that local governments may be held responsible for injuries caused by their officials' violations of constitutional rights where those acts "may fairly be said to represent official policy . . . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). The decision below is not consistent with these basic principles.

The Zoning Resolution rivals the Internal Revenue Code in breadth and complexity. It has undergone countless amendments since its initial enactment in 1961; no owner could afford to develop his property were he required to examine each of the original legislative proceedings to ascertain how they affect his parcel. Nor does the City expect him to.

Appellant's permit was issued after a full examination of its building plans conducted in accordance with the regular procedures established by the City. It was issued by the officers who were charged with responsibility for reviewing plans and issuing permits and, in connection therewith, administering and interpreting the Zoning Resolution. When issued, that permit conformed with (and appeared to be based upon) a reasonable interpretation of the Zoning Resolution.[5]

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5 Indeed, had appellant's architects or the relevant municipal officials—or the activists who were looking over their shoulders—detected some issue that required reference to the underlying enabling legislation of

The City's subsequent determination that the PI District's boundary was not where its officials previously had thought it to be amounts to a new interpretation of the zoning laws applicable to appellant's project. In revoking appellant's permit, the City is giving that new interpretation retrospective effect. On the facts at bar, due process precludes the City from doing that.

The retroactive application of any rule or interpretation of law, whether legislative, judicial or regulatory, constitutes a deprivation of due process where the harshness and unfairness of retroactivity outweigh the public benefit—which is particularly the case where, as here, the affected persons have had no adequate opportunity to conduct their activities so as to comply with the new rule. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389-390 (1932); *Blodgett v. Holden*, 275 U.S. 142, 147 (1927); *see also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1939).

The retroactive application of zoning legislation in particular is arbitrary and unreasonable, and therefore unconstitutional, where it operates to destroy substantial structures built prior to adoption of the legislation. The New York Court of Appeals articulated this fundamental principle more than 35 years ago in *People v. Miller*, 304 N.Y. 105 (1952), where it explained:

> It is the law of this state that noncomforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance. * * * The decisions are sometimes put on the ground that the owner has secured a "vested right" in the particular use—which is but another way of saying that the property interest affected by the particular

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the Board of Estimate, they are likely to have reached the same conclusion in view of the clarity with which the certified diagrams incorporated in the enabling legislation of March 3, 1983, and May 24, 1984, depicted the PI District's boundary at 96th Street.

> ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.

304 N.Y. at 107. *See also Dobbins v. City of Los Angeles*, 195 U.S. 223, 238-239 (1904); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982). More recently, New York's Court of Appeals has "recognized that [this] vested rights doctrine is conclusory, and indeed a fiction that 'hides many unmentioned considerations of fairness . . . .' " *Hodes v. Axelrod*, 70 N.Y.2d 364, 370 (1987), *quoting from Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 518 (1969).

In the present case, however, the Court below determined that appellant's permit was not entitled to the protection of this "fiction" and, instead, the Court embraced another fiction—*i.e.*, the proposition that the permit was "invalid" when issued and conferred no rights whatsoever because the PI District's boundary actually was somewhere other than where zoning map 6b depicted it.

This Court has made it clear that States and localities may not rely on the fiction that a party never attained anything rising to the status of property as a justification for depriving that party of its constitutional rights. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539 n. 4 (1985); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). Indeed, this Court has made clear that, although property rights and interests generally are created by "an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement" that is protected by the due process clause. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978).

In the zoning and land use context, the courts of the various States have modified the rigid concepts of traditional vested rights doctrine by enunciating equitable principles to grapple with the issues posed by owners' reasonable reliance on building permits that appeared to be valid when issued but subsequently

were disavowed. A leading commentator thus points out that, in "cases of 'honest error,' " where "a permit has been issued in good faith but is based upon an erroneous, though arguably correct interpretation of the zoning ordinance," courts have held that the "municipality is estopped from revoking the permit when the permittee has acted in reliance upon it." 3 Rathkopf, *The Law of Zoning and Planning* § 45.05[3][d] (4th ed. 1986).

In fact, an important early decision was written by Justice Brennan of this Court when he was a state court trial judge. *Kurowski v. Board of Adjustment*, 11 N.J. Super. 433, 78 A.2d 429, 433-434 (1951), cited with approval in the seminal decision of *Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 124 A.2d 14, 16-18 (1956), *aff'd*, 24 N.J. 326, 131 A.2d 881 (1957). Since then, courts in at least fourteen States have held that estoppel can be available to preclude the revocation of a building permit where there has been substantial good faith reliance and the permit was not plainly invalid when issued.[6]

New York's Court of Appeals has now firmly rejected this approach, holding that this case is governed by earlier precedents (*see, e.g., City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 504-505 [1952]) in which the Court determined that a building inspector's error in issuing a permit did not create an estoppel—even though in this case, unlike the earlier cases, the

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6 *See, e.g., Municipality of Anchorage v. Schneider*, 685 P.2d 94, 96 (Alaska 1984); *People v. Dep't of Housing and Community Development*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266, 273-275 (1975); *Zoning Comm'n of Sherman v. Lescynski*, 188 Conn. 724, 453 A.2d 1144, 1149 (1982); *City and County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 296 (1957); *O.P. Corp. v. Village of North Palm Beach*, 278 So.2d 593, 595 (Fla. 1973); *Cities Service Oil Co. v. City of Des Plaines*, 21 Ill.2d 157, 171 N.E.2d 605, 608 (1961); *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 518 A.2d 123, 126-130 (1986); *Ridgewood Development Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980); *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966); *J.E.D. Associates, Inc. v. Town of Danville*, 122 N.H. 234, 444 A.2d 493, 494 (1982); *Bonsall v. Township of Mendham*, 116 N.J. Super. 337, 282 A.2d 410, 414 (App. Div.), *cert. denied*, 59 N.J. 529, 284 A.2d 354 (1971); *Caporali v. Ward*, 89 Pa. Commw. 621, 493 A.2d 791, 793-794 (1985); *Town of Glocester v. Olivo's Mobile Home Court, Inc.*, 111 R.I. 120, 300 A.2d 465, 471 (1973); *Keller v. City of Bellingham*, 92 Wash.2d 726, 600 P.2d 1276, 1279-1280 (1979).

building inspectors did not make any errors but acted in conformity with the City's official zoning map.[7] Due process is offended, however, by governmental action that contravenes a basic sense of justice. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502-507 (1977); *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, 602 (1976); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Rochin v. California*, 342 U.S. 163, 173 (1951).

This Court has recognized that there are circumstances in which due process precludes the government from repudiating the apparently authoritative actions of its own officials. Thus, in *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court held that the defendant's criminal conviction under a statute that prohibited demonstrations "near" a courthouse was not consistent with due process where the defendant had relied on local police officials' advice that his group could assemble across the street. According to this Court, the statute "fore[saw] a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering it and enforcing it," so that the on-the-spot interpretation on which the defendant had relied was not a "waiver of law . . . beyond the power of the police." 379 U.S. at 568-569. *See also United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973). There, this Court recognized a defense of reliance where the defendant was "affirmatively misled" by "longstanding, official administrative construction" of a statute. 411 U.S. at 670. The Court concluded that the defendant had been "deprived . . . of fair warning" as to the conduct proscribed, so that "there can be no doubt that traditional notions of fairness" prevented the government from proceeding with the prosecution. *Id.* at 674.

These principles apply here. Appellant faces an enormous forfeiture even though at all times it proceeded in accordance with what the law appeared to be, as interpreted and codified by the Department of City Planning, and as interpreted and administered by the Department of Buildings in the course of its formal examination of appellant's plans. The Zoning Resolution is a statute that requires day-to-day, practical enforcement.

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7 *See also E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 369-371 (1988), decided by the Court of Appeals simultaneously with this case.

Given the statute's complexity, owners and their architects must rely on the Zoning Resolution (*i.e.*, on the 900-page looseleaf version, including the 125 maps contained therein, published by the Department of City Planning); it is the only document that the City itself provides to the officials at the Department of Buildings who are charged with the duty of administering the statute.

Unless clearly erroneous, these officials' interpretations of the Zoning Resolution are entitled to a presumption of regularity. The City may not disavow them *in toto* where, as here, they are not patently unreasonable, they are consistent with a zoning map prepared by the City itself and incorporated in the ordinance, they also are consistent with a certified diagram incorporated in the underlying enabling legislation, and there has been substantial good faith reliance. The contrary conclusion that has been sanctioned below is not consistent with due process.

III. Appellant's Due Process Claim Is Ripe and Should Have Been Adjudicated Below

By affirming the Appellate Division's order and declining to adjudicate appellant's due process claim on the ground that it is premature, the highest court in New York in effect has decided adversely to appellant federal constitutional questions of substantial importance.

Appellant's claim is ripe. In concluding otherwise, the Court of Appeals relied exclusively on New York cases holding that a constitutional attack on a zoning ordinance as confiscatory cannot be adjudicated until a variance has been sought. This Court has articulated a similar rule in cases challenging land use regulations as takings without compensation. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566-2569 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-191 (1986).

But the rule has not been applied to due process claims. This Court has adjudicated such claims even in cases in which taking claims were premature. *See Pennell v. City of San Jose*, 108 S. Ct. 849, 857-859 (1988); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-304 (1981); *see also Her-*

rington v. County of Sonoma, 834 F.2d 1488, 1497-1499 (9th Cir. 1988). Indeed, the rule's rationale—*i.e.*, that it is not until available administrative remedies have been pursued that the courts can determine whether a regulation's interference with an owner's use of his property is so substantial that it amounts to a taking—does not apply to, and makes no sense in the context of, due process claims like those here.[8]

Appellant does not challenge the hypothetical future effect of zoning legislation, but the actual application to it of specific statutory provisions that already have served to deprive it of property. It had expected to complete the project and sell its condominium units by the spring of 1987. Instead, construction above the 19th floor has been halted since 1986, and appellant cannot obtain a certificate of occupancy for even the lower 19 floors until the top twelve floors are either removed or legalized and completed. In the meantime, the Property generates no income whatsoever, carrying charges continue and construction costs increase. The New York courts have responded by relegating appellant to the uncertainties of a variance application that is likely to lead to further litigation, regardless of the outcome.

No variance, even if granted, can undo or even ameliorate the enormous injuries already suffered by appellant, which will not be made whole. Appellant's injuries, resulting as they do from governmental land use regulation, no longer can be regarded as merely a business risk inherent in the ownership of private property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378, 2388-2389 (1987).

The Court of Appeals was wrong to refuse to decide whether the deprivation to which appellant already has been subjected was effectuated without due process. Its erroneous refusal to address this question on the merits is the equivalent, for purposes of 28 U.S.C. § 1257(2), of an erroneous rejection of appellant's claim. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 290-291 n. 3 (1973); *Williams v. Kaiser*, 323 U.S. 471, 478 (1945); *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-

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8 Appellant concedes that a claim that the City's actions constitute a taking without compensation is premature pending determination of its variance application.

283 (1932). Therefore, this Court has jurisdiction to hear this case and decide appellant's claim.

Conclusion

Under the guise of revoking a permit that supposedly never was valid (even though it was reviewed repeatedly by the competent authorities and conformed to the official zoning map, which, in turn, was consistent with a diagram certified by the City Planning Commission and incorporated in the underlying enabling legislation), the City of New York is subjecting appellant to grotesque mistreatment. The City has violated appellant's right to due process of law, and the decision below should be reversed.

May 9, 1988

Respectfully submitted,

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Counsel for Appellant

Of Counsel:
Hector Torres
Audry Weintrob

Appendix 1

Order (Remittitur) of the Court of Appeals of the State of New York, dated and filed February 9, 1988

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 23

In the Matter of

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents,

and

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

The appellant in the above entitled appeal appeared by Rosenman & Colin, Esqs.; the respondents appeared by Hon. Peter L. Zimroth, Corporation Counsel; Berle Kass & Case, Esqs.; and the *amici curiae* appeared by Golenbock and Barell, Esqs.; Marc Silver, Esq.; Jeremiah Gutman, Esq. and Martin Gallent, Esq.

The Court, after due deliberation, orders and adjudges that the order affirmed [*sic*], with costs. Opinion by Judge Bella-

cosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ DONALD M. SHERAW

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 9, 1988.

Appendix 2

Opinion of the Court of Appeals of the State of New York, dated and filed February 9, 1988

STATE OF NEW YORK
COURT OF APPEALS

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 23

In the Matter of

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents,

and

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

Jeffrey L. Braun, Hector Torres & Audry Weintrob, NY City, for appellant.

Peter L. Zimroth, NYC Corporation Counsel (Phyllis Arnold & Elizabeth S. Natrella of counsel) for respondent City of NY.

Robert S. Davis & Karl S. Coplan, NY City for respondent Civitas.

BELLACOSA, J.:

We hold in this case involving the height of a building on Park Avenue in Manhattan, already constructed in excess of the height limitations of applicable zoning provisions, that estoppel is not available to preclude a governmental entity from discharging its statutory duties or to compel ratification of prior erroneous implementation in the issuance of an invalid building permit. The rare exception to the unavailability of estoppel against governmental entities may not, in any event, be invoked in this case where reasonable diligence by a good faith inquirer would have disclosed the true facts and the bureaucratic error. We may not address the additional claim that governmental correction of prior administrative action, erroneously overriding applicable zoning provisions, constitutes an unconstitutional taking inasmuch as there is a pending variance application. We thus affirm the Appellate Division's order affirming the denial of relief to plaintiff.

Owner-builder Parkview's property, purchased in 1982, is at the southeast corner of Park Avenue and 96th Street, located 90 to 190 feet east of Park Avenue. A portion of the property is within a Special Park Improvement District (P.I.D.) created by enactment of the Board of Estimate of the City of New York in 1973. The enabling and authorizing resolution limits the height of new buildings in that district to 19 stories or 210 feet, whichever is less. The P.I.D. boundary ran uniformly 150 feet east of Park Avenue until by resolution of the Board of Estimate on March 3,1983, the metes and bounds description of the P.I.D. was amended, providing in part for a reduction from 150 to 100 feet between East 88 Street to midway between 95th and 96th Streets. The boundary north of this midblock division, pursuant to the metes and bounds, remained at all times 150 feet. Plaintiff's property was thus unaffected by this 1983 change and has always been governed by the 1973 original enactment.

Zoning map 6-b accompanying the March, 1983 resolution depicted the amended boundary with a dotted line which fell within a shaded area constituting the existing P.I.D. A numerical designation of "150", included on earlier versions of the

map to show the setback, had been removed and a new designation of "100" was inserted adjacent to the dotted line. This left no numerical designation along the northern part of the boundary. The "150" designation signaling the retention of the boundary north of the 95th-96th Street midblock line was reinserted on a version of map 6-b published to reflect a subsequent resolution of September 19, 1985.

Parkview's initial new building application, submitted on June 5, 1985, was rejected for failure to show compliance with the P.I.D. height limitation. Based upon its interpretation of the version of zoning map 6-b existing in the summer of 1985, Parkview concluded that a 100 foot boundary controlled, and its revised building application, submitted on July 31, 1985, limited the height of the proposed new building to 19 stories between its property line and 100 feet from Park Avenue. The portion of the building setback more than 100 feet from Park Avenue was to rise 31 stories. The application was approved by the Department of Buildings as conforming with all zoning requirements on August 12, 1985 and, after re-review, a building permit was issued on November 21, 1985 by the Borough Superintendent. There is no dispute that at the time the permit was issued the Department erroneously intepreted amended map 6-b as changing the boundary on 96th Street to 100 feet. On July 11, 1986, however, after substantial construction, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building over 19 stories within the full 150 feet of Park Avenue. After review, the Commissioner of Buildings partially revoked the building permit, consistent with the stop work order, on the grounds that the permit, to the extent it authorized a height of 31 stories from 100 feet back instead of 150 feet back, was invalid when issued.

Parkview appealed the Commissioner's decision to the Board of Standards and Appeals (BSA), which denied the appeal and sustained the determination of the Commissioner. In sum, the BSA found that the dotted lines on zoning map 6-b within the shaded P.I.D., expressly connoting a reduction to 100 from 150 feet of the protected area, excluded the 96th Street frontage of plaintiff from any change; that the original resolution with its

metes and bounds description, which was never changed in any event, controlled over the map depicting the boundaries even if the map could be misread; and that the boundary-height limitation applicable to Parkview under the metes and bounds description was and had always been 150 feet east of Park Avenue.

Parkview then turned to the courts, essentially in an article 78 proceeding, seeking to set aside the partial revocation of its building permit. It sought to reinstate the full permit, arguing that the final BSA determination was arbitrary and capricious or affected by error of law because the original permit was properly issued; that its rights pursuant to that permit had vested; that its reliance on the permit caused substantial and irreparable harm requiring that the City be estopped from revoking the permit; and that the partial revocation deprived Parkview of its property without due process or just compensation.

Special Term dismissed the petition holding that the BSA's determination was reasonable and supported by substantial evidence that the building permit was invalid when issued, vesting no rights, because the building plans did not comport with the metes and bounds description for the P.I.D. as contained in the controlling original legislative enactment of the Board of Estimate. The court also held that estoppel was unavailable as a matter of law. Finally, the constitutional taking argument was dismissed as premature because Parkview had failed to apply for a variance which is a prerequisite to that claim. The Appellate Division affirmed without opinion, and this appeal ensued by leave of this Court.

Parkview argues that its original permit was issued in conformity with a reasonable interpretation of the zoning map, thus making it valid when issued; that the principles of equitable estoppel preclude the partial revocation of the building permit even if the permit was erroneously issued; and that the City's partial revocation of its permit constitutes a taking in violation of due process of law and without just compensation. The City counters that the decision of the BSA has a rational basis because the permit was invalid when issued; that equitable

estoppel is not available to estop a municipality from enforcing its zoning laws when the building permit issued by the municipality violated those zoning laws; and that the petition below failed to state a claim for an unconstitutional taking.

There can be little quarrel with the proposition that the New York City Department of Buildings has no discretion to issue a building permit which fails to conform with applicable provisions of law, and that the Commissioner may revoke a permit which "has been issued in error and conditions are such that a permit should not have been issued" (Administrative Code of the City of New York §§ 27-191, 27-197). Since discrepancies between the map and enabling resolution are controlled by the specifics of the resolution (New York City Zoning Resolution §§ 11-22, 12-01), the original permit in this case was invalid inasmuch as it authorized construction within the 150 foot P.I.D. above 19 stories in violation of New York City Zoning Resolution § 92-06 (Journal of Proceedings of the Board of Estimate of the City of New York, Vol. II, p 1708 [Cal. No. 6, April 23, 1973], as amended [Cal No. 8, March 3, 1983]). Therefore, the subsequent BSA action in ratifying the decision of the Commissioner partially revoking Parkview's permit had a sound legal basis. Indeed, there was no discretion reposed in these authorities to do otherwise at that point and on the record before them at that time.

Turning to the next stage of our analysis, we have only recently once again said that "[g]enerally estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties" (*Scruggs-Leftwich v Rivercross Tenant's Corp.*, ____ NY2d ____ [slip opn 11-19-87, at 3], *citing Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33; *M/O Hampton's Hospital and Medical Center v Moore*, 52 NY2d 88, 93; *see also*, *EFS Venture Corp. v Foster*, ____ NY2d ____ [slip opn, decided today]). Moreover, "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error" (*Morley v Arricale*, 66 NY2d 665, 667). In particular, "a municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or laches" (*City of Yonkers v Rentways, Inc.*, 304 NY

499, 505) and "[t]he prior issue to petitioner of a building permit could not 'confer rights in violation of the zoning laws' " (*B & G Construction Corp. v Bd. of Appeals*, 309 NY 730, 732, *citing City of Buffalo v Roadway Transit Co.*, 303 NY 453, 463). Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results (*Parsa v St. of NY*, 64 NY2d 143, 147; *City of NY v City Civil Service Comm*, 60 NY2d 436, 448-449), the City should not be estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution. Even if there was municipal error in one map and in the mistaken administrative issuance of the original permit, those factors would be completely outweighed in this case by the doctrine that reasonable diligence would have readily uncovered for a good faith inquirer the existence of the unequivocal limitations of 150 feet in the original binding metes and bounds description of the enabling legislation, and that this boundary has never been changed by the Board of Estimate. The policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases thus have irrefutable cogency in this case.

Finally, Parkview's claim that the City's action constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance (*see*, *Church of St. Paul v Barwick*, 67 NY2d 510, 519; *see also*, *Scarsdale Supply Co. v Village of Scarsdale*, 8 NY2d 325, 330; *Levitt, Inc. v Village of Sands Point*, 6 NY2d 269, 273). The variance application now pending is, of course, not affected by our decision today.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

Decided February 9, 1988

Appendix 3

Order of the Appellate Division (First Judicial Department) of the Supreme Court of the State of New York, dated and filed April 2, 1987

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 2, 1987

PRESENT—HON. FRANCIS T. MURPHY, *Presiding Justice*
LEONARD H. SANDLER
JOHN CARRO
SIDNEY H. ASCH
ERNST H. ROSENBERGER, *Justices.*

29639

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner-Appellant,

For Judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents-Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (William McCooe, J.). entered on or about November 25, 1986,

And said appeal having been argued by Jeffrey L. Braun, Hector Torres, Audry Weintrob and Doron Goldman of counsel for appellant, by Elizabeth S. Natrella, Pamela Seider Dolgow and Phyllis Arnold of counsel for respondents-respondents, by Robert S. Davis and Karl S. Coplan of counsel for intervenor respondent-respondent, by John R. Low-Beer and Martin Gallent of counsel for Carnegie Hill Neighbors, The Friends of the Upper East Side Historic Districts, The Goat Hill Association, Landmark West, The Lenox Hill Neighborhood Association, The Municipal Art Society of New York, Sutton Area Community, Inc., The Union Square Park Community Coalition, Inc., and The Yorkville Civic Council as Amici Curiae, and by Charles G. Moerdler, Curtis C. Mechling and Mary J. Fahey of counsel for Associated Builders & Owners of Greater New York and Real Estate Board of New York, as Amici Curiae; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed for the reasons stated by McCooe, J., without costs and without disbursements.

ENTER:

s/ HAROLD J. REYNOLDS
Clerk.

Appendix 4

Decision and Judgment of the Supreme Court of the State of New York, County of New York, dated November 18, 1986, and filed November 23, 1986

SUPREME COURT—NEW YORK COUNTY
IAS—PART 8

Index No. 23977/86

#29 10/30/86

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner,

For judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

McCOOE, J.:

This is an Article 78 proceeding in the nature of a certiorari to review a determination of the Board of Standards and Appeals (BSA) which denied petitioner's appeal and sustained a deter-

mination of the Commissioner of Buildings which partially revoked petitioner's building permits based on a zoning violation and to mandamus the respondents to reinstate the building permits in their entirety. Petitioner further seeks a determination that the zoning regulations have been applied to it in an unconstitutional manner. The permits were issued by the Buildings Department (Department) based upon an inaccurate amended Zoning Map (Map 6b) which deviated from a 1973 Resolution of the Board of Estimate (BOE) creating a Special Parks Improvement District (District) limiting the construction of buildings within the District to the lesser height of 19 stories or 210 feet. Petitioner has constructed a 31 story building at 108 East 96th Street which is partially within the District, allegedly in a good faith reliance on amended Map 6b and seeks reinstatement of the full building permit to legalize the building as constructed.

The District was created in 1973 by a Resolution of the BOE which defined its geographical boundaries and height restrictions for new construction. The Resolution set the District boundary on East 96th Street at 150 feet east of Park Avenue. Petitioner acquired the subject property in 1982 which partially extended into the District. A 1983 BOE Resolution amended the District boundaries by reducing it from 150 feet to 100 feet east of Park Avenue from 88th Street to the midblock between 95th and 96th Street but left unchanged the 150 foot boundary from Park Avenue on East 96th Street where the subject property is located. The revised zoning map, amended Map 6b, inaccurately reflected a 100 foot rather than a 150 foot east boundary on East 96th Street. The 100 foot restriction is reflected by the absence of a distance marking, which under the applicable zoning law, means 100 feet from the nearest street.

Petitioner applied for and was issued building permits in 1985 by the Department which approved the plans for a 31 story building based on amended Map 6b which indicated a 100 foot rather than a 150 boundary on East 96th Street. There is no factual issue that the Department interpreted amended Map 6b as having a 100 foot boundary on East 96th Street. Work commenced on the building and on July 11, 1986 the Department

issued a stop work order based on the height violation of the zoning resolution. Petitioner has substantially completed a 31 story building at a cost exceeding $7.2 million.

Petitioner presents two principal arguments in support of its application. First, it contends that the permits were lawful when issued since the zoning law in dispute was amended Zoning Map 6b published by the Department of City Planning. Secondly, it contends that in any event the respondents should be estopped from asserting to the contrary since they published the inaccurate Map and petitioners relied on the Map in good faith. It contends that it could have constructed a building on the site conforming to the zoning regulation if there was no error.

Petitioner in support of its first contention particularizes its arguments and its interpretation of the controlling law as follows. Petitioner contends that amended Map 6b is the statute and that its unambiguous marking of the zoning district Map controls, citing Matter of Mahoney, N.Y.L.J., Oct. 15, 1979, p. 12, col. 1, and that no further examination of legislative history need take place. Sega v. State, 60 N.Y.2d 183, 191. It further contends that the Board of Estimate resolution is simply legislative history. Petitioner in advocating the primacy of amended Map 6b enunciates two canons of construction in zoning cases. First, that zoning regulations must be strictly construed against the municipality enacting them. Matter of Allen v. Adami, 39 N.Y.2d 275, 277; Bayswater Health v. Karagheuzoff, 37 N.Y.2d 408; FGL & L Prop. Corp. v. City of Rye, 66 N.Y.2d 111. Second, that zoning boundaries be sufficiently definite by referring to zoning ordinances and zoning maps without resorting to extrinsic evidence. Keeney v. Village of Le Roy, 22 A.D.2d 159, 162. Petitioner states that in interpreting amended Map 6b Zoning Resolution, Sec. 76-131 governs and provides that where "no dimensions are shown, such boundary line shall be considered . . . (c) . . . 100 feet from the nearest street within the district". Petitioner questions respondents' interpretation of the October 25, 1982 diagram accompanying the Board of Estimate March 3, 1983 resolution, arguing as to the relative weight of dotted lines and shading thereon.

Petitioner in support of its second principal contention alleges its good faith reliance upon the building permits and substantial construction to demonstrate vested rights and to invoke an estoppel against the respondents. Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, aff'd 32 N.Y.2d 796; Bender v. New York City HHC, 38 N.Y.2d 662 as well as numerous authorities hereinafter considered. Petitioner cites Jim Davis Devel. Corp. v. Town of Brookhaven, N.Y.L.J., March 2, 1973, p. 20, col. 8, aff'd 42 A.D.2d 705, wherein the building inspector revoked permits after a substantial investment in construction by petitioner and Matter of Harney, N.Y.L.J., Oct. 30, 1984, p. 14, col. 1, in which estoppel was found against the Landmark Preservation Commission whose historic district designations had not been included in the Building Department records. Petitioner contends that if ambiguity existed in amended Map 6b, both respondents, as well as petitioner, had the duty to inquire further, citing Admin. Code, Sec. C26-108.6 for Building Department responsibility.

Intervenor-respondent Civitas Citizens, Inc. opposes the petition, urging that the 150 feet restriction on East 96th Street was unaffected by the March 3, 1983 Board of Estimate resolution, which was unambiguous, and that petitioner's contrary position is based upon speculation as to what the Board understood to be the effect of the resolution. Intervenor contends that the general rule of the unavailability of estoppel against a municipality should be applied and that no vested rights can arise from an illegal building permit. Intervenor distinguishes a series of cases wherein vested rights arise when a developer performs construction work in reliance on a valid permit and a subsequent change in the zoning ordinance renders the structure illegal.

The determination of the BSA is affirmed and the petition is dismissed. Respondent Department properly revoked in part the permits it had previously erroneously issued since the original approval was unauthorized under New York City Administrative Code ("Admin. Code"), Sec. C26-118-1 when there was a failure to conform to the zoning law. Citizens for the Preservation of Windsor Terrace v. Smith, [122 A.D.2d 827]. Admin.

Code, Sec. C26-118-7 authorizes the revocation of permits issued in error. The permits were invalid when issued and create no rights in petitioner. The controlling legislative act is the metes and bounds description in the Resolution, City of Utica v. Paternoster, 64 Misc.2d 749, 751, rather than the subsequently printed and erroneous amended Map 6b, which "is simply a supplementary graphic representation," Deans v. West, 203 N.W.2d 504, and only some evidence of the actual zoning. Wainwright v. City of Wheat Ridge, 558 P.2d 1005. The diagram dated October 25,1982 presented to the BOE on March 3, 1983 shows by dotted line that the revised boundary of the District only extended to the 95-96th Street midblock. Even if the diagram were unclear, or supported petitioner's position, the metes and bounds description retaining the 150 feet boundary on East 96th Street would control. People v. Mobil Oil Corp., 48 N.Y.2d 192, 199-200; Matter of Prospect v. Cohalan, 109 A.D.2d 210, 216, aff'd 65 N.Y.2d 867. The zoning resolution itself is sufficiently descriptive to embody the legislative intent. Matter of PHVT Corp. v. McGuire, 58 Misc.2d 159; Soron Realty v. Town of Geddes, 23 A.D.2d 165. Furthermore, the 1983 version of the BOE Resolution advocated by petitioner would be invalid since it fails to conform to ULURP procedures for amending the 1973 Resolution. The Resolutions of the BOE are the legislation and control.

The relationship of the Board resolution to the zoning map is analogous to an inconsistency between a federal statute and its published codification where the former controls. United States v. Welden, 377 U.S. 95, 98, n. 4. See also People v. Hartwell, 166 N.Y. 361. Petitioner's contention that the silence of amended Map 6b as to the dimensions of the boundary on East 96th Street should result in an interpretation of 100 feet is unavailing since Zoning Resolution, Sec. 76-131(c) dictates such a result only where, unlike the present case, in the Board resolution itself "no dimensions are shown". In any event since the zoning map is not the statute, the interpretive language is ineffective. Matter of Colony Park v. Malone, 25 Misc.2d 1072, 1076. Matter of Mahoney, supra, relied upon by petitioner, is distinguishable in that the Town in that case was unable to clar-

ify the discrepancy between 1929 and 1966 zoning maps. Petitioner's reliance on authorities holding that ambiguities are to be resolved in favor of the property owner where, as here, there is no ambiguity is misplaced.

Respondent BSA's determination sustaining the partial revocation by respondent Commissioner of petitioner's permits has a reasonable basis in the record and in law and this Court must sustain such a construction of a statute by the administering agency. John P. v. Whelan, 54 N.Y.2d 89, 95-96; Bernstein v. Toia, 43 N.Y.2d 437, 448; Howard v. Wyman, 28 N.Y.2d 434. Even if the Court were not to apply the arbitrary and capricious standard and apply the standard of review sought by petitioner treating the petitioner as raising purely an issue of statutory construction under Kurcsics v. Merchants Mutual Life Ins. Co., 49 N.Y.2d 451 and afford little deference to the agency interpretation, the result would not be affected.

Petitioner's second principal contention is that it acquired vested rights and seeks to invoke an estoppel against respondents. The distinction between permits validly issued and thereafter revoked and permits invalidly issued and thereafter revoked is crucial to this issue. Vested rights of a property owner are those which, after an acquisition, may not be extinguished by government action. Reichenbach v. Windward at Southampton, 80 Misc.2d 1031, 1038, aff'd 48 A.D.2d 909, app. dism. 38 N.Y.2d 912. Vested rights do not arise from invalidly issued building permits. Perrotta v. City of New York, 107 A.D.2d 320, aff'd 66 N.Y.2d 859; Natchev v. Klein, 41 N.Y.2d 833; Albert v. Board of Standards and Appeals, 89 A.D.2d 960, app. dism. 59 N.Y.2d 673.

Petitioner cannot under the present circumstances invoke an estoppel against the municipal respondents. Public Impvts. Inc. v. Board of Education, 56 N.Y.2d 850; Hamptons Hospital v. Moore, 52 N.Y.2d 88. In Perrotta v. City of New York, supra, this rule was applied in a zoning matter after the petitioner had performed substantial construction following the issuance of a void permit which was subsequently revoked. The determinations in both Perrotta and in Albert, supra, were without prejudice to petitioner's right to apply for a variance. In Re Van

Wagner Advtg., N.Y.L.J., July 16, 1986, p. 11, col. 1, Sup. Ct., N.Y. Co., involved a review of a refusal by BSA to grant an area variance in which the Court refused to invoke estoppel against the City which had revoked illegal permits in spite of the performance of construction work.

Respondents factually question the good faith of petitioner since it acquired the property when the original Map 6b was controlling, its failure to examine the Resolutions which was its principal responsibility rather than of respondents, its charged knowledge that ULURP would have required community consideration and finally respondents' claim that a further amended map reflecting zoning changes as of September 19, 1985 indicated the "150" foot restriction in the subject area.

It is unnecessary to consider the factual issues as to the good faith reliance by petitioner since an estoppel against respondents is unavailable as a matter of law. Petitioner relies upon Faymor v. Board of Standards and Appeals, 45 N.Y.2d 560 and Matter of Harney, supra, both of which are distinguishable. In Faymor, unlike the present case wherein respondents acted in good faith, the permits had been initially lawfully issued and were revoked arbitrarily by the City, as part of a pattern of misconduct which supported the estoppel invoked by the Court. Harney involved an estoppel against the Landmarks Preservation Commission in a case where the records of the Building Department issuing the permit were silent as to historic district designations. Additional authorities cited by petitioner are also unavailing to invoke estoppel against respondents. In Lefrak Forest Hills Corp. v. Galvin, supra, the permits were legal when issued and extended and the holding involved the arbitrariness of a BSA denial of further extension rather than an estoppel. Similarly in Jim Davis Devel. Corp. v. Town Board, supra, petitioner prevailed since the permits were legal when issued and rendered illegal by a subsequent change in the law, as was also the case in Landmark Colony v. Board of Supervisors, 113 A.D.2d 741. Each of petitioner's other citations also misses the mark. Neither Eden v. Board of Trustees, 49 A.D.2d 277 nor Bender v. New York HHC, supra, involved building permits and each were limited to their individual facts. In Bender this

limitation was expressly set forth by the Court in Hampton Hospital v. Moore, supra. Scruggs-Leftwich v. Rivercross Tenants Corp., [119] A.D.2d [88] and 1555 Boston Road Corp. v. Fin. Admr., 61 A.D.2d 187 were unrelated to zoning and involved arbitrary changes in government policy. In the absence of allegations supporting either the ripening of vested rights or an estoppel, petitioner's claims based on vested rights and estoppel must be dismissed.

The final claims in the petition allege State and Federal claims of an unconstitutional taking or deprivation of property by virtue of the application of the zoning resolutions as to District height limitations to petitioner's property. However, an application to respondent for a variance pursuant to its power under Zoning Resolution, Sec. 72-21 and NYC Charter, Sec. 666, is a condition precedent to such claims. Euclid v. Ambler Realty Co., 272 U.S. 365; Scarsdale Supply Co. v. Village of Scarsdale, 8N.Y.2d 325, 330; Levitt v. Incorp. Village of Sands Point, 6 N.Y.2d 269, 273. Since the ordinance is otherwise valid and reasonable, an administrative application may save its constitutionality, St. Basil's Church v. Kerner, 125 Misc. 526, and judicial review is premature. Incorp. Village of Upper Brookville v. Faraco, 282 App. Div. 943, 944, aff'd 307 N.Y. 642. In any event the enforcement of the District height limitation does not give rise to an unconstitutional taking which is defined in French Investing Co. v. City, 39 N.Y.2d 587, 594-596, as a restriction rendering the property "unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroy its economic value, or all but a bare residue of its value". The Due Process clause does not protect against the denial of one use and the property in question may be utilized as a 19 story building, or reconfigured, or sold. Andrus v. Allard, 444 U.S. 51; Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468. Since the petition fails to state either a State or Federal constitutional claim they are dismissed.

Petition dismissed. There is no relief requested as to the counterclaim which in any event would be premature before the variance issue is decided.

This is the Decision and Judgment of the Court.

Dated: November 18, 1986

s/ WILLIAM P. MCCOOE
J.S.C.

Appendix 5

Resolution of the Board of Standards and Appeals of the City of New York, dated October 14, 1986, and filed October 15, 1986

BSA CAL. 705-86-A
Premises: 108 East 96th Street
Dated: October 14, 1986

WHEREAS, this application requests a determination that the Department of Buildings was in error in revoking the building permit issued for these premises on the basis that a substantial portion of the lot falls within the Special Park Improvement (PI) District; and

WHEREAS, the applicant has argued that the boundary line of the PI District is located 100 feet east of Park Avenue along 96th Street as indicated on a map accompanying an amendment of the District boundary lines adopted by the Board of Estimate March 3, 1983; and

WHEREAS, the applicant has argued that subsequent to that 1983 action, maps printed in the volumes of the Zoning Resolution which were sold to the public, indicated the boundary of the district to be 100 ft.; and that such maps were the basis of the issuance of the building permit in November of 1985; and

WHEREAS, the applicant has argued further that the inclusion of the small notation of "150" to denote the width of the PI District on East 96th Street, included in the December 1985 publication of the Zoning Resolution, was an erroneous and invalid amendment of the district, not properly adopted under Charter-defined procedures; and

WHEREAS, the record indicates that prior to March 3, 1983, the width of the PI District on East 96th Street was 150 ft.; and

WHEREAS, the record indicates that on March 3, 1983, the Board of Estimate adopted a Resolution which described in terms of metes and bounds the boundaries of the PI District, making certain changes in the width of the district at various

streets but making no change to the boundary line located 150 feet from the Park Avenue intersection on East 96th Street; and

WHEREAS, although the applicant has argued that an accompanying map published by the City Planning Commission on October 25, 1982 and included in the Board of Estimate calendar of March 3, 1983 indicated "shading" of uniform width at all intersections covered by the PI District; that map also contained dotted lines indicating those intersections at which boundary line changes were being made and excluded the 96th Street frontage from the areas marked by dotted lines; and

WHEREAS, the Board has determined that to the extent that there might be a lack of clarity between the map of October 25, 1982 and the Board of Estimate Resolution, the Resolution with its metes and bounds description clearly controls and is, in fact, the law with respect to the boundary of the PI district; and

WHEREAS, although the applicant has suggested that it was "likely" that Board of Estimate members understood themselves to be voting on the map rather than a written description as embodied in the resolution, the jurisdiction of the Board of Standards and Appeals does not extend to an inquiry into the decision-making process of the Board of Estimate; and

WHEREAS, the map accompanying the Board of Estimate Resolution contains a legend explaining that the area marked by dotted lines is the subject of the Board of Estimate action; thus it cannot be argued that the width of the district at East 96th Street was before the Board of Estimate and was acted upon by them on March 3, 1983; and

WHEREAS, after the official action of the Board of Estimate which clearly spelled out the boundary lines of the district, an error or lack of clarity in the printing of a map to accompany the Zoning Resolution cannot be held to represent a change in the substance of the law; and

WHEREAS, in this appeal application, the Board is not given authority to rule on any issue related to a developer's reliance on an erroneously issued permit.

Therefore, be it Resolved, the Board hereby determines that at all relevant dates on which approvals for permits for these premises were issued and revoked, the boundary line of the PI District was 150 ft. from Park Avenue along East 96th Street and that, therefore, the determination of the Commissioner of Buildings dated July 22, 1986 is sustained and the appeal is denied.

Adopted by the Board of Standards and Appeals, October 14, 1986.

Appendix 6

Determination of the Commissioner of the Department of Buildings of the City of New York, dated July 22, 1986

THE CITY OF NEW YORK

Department of Buildings
Executive Offices
120 Wall Street, New York, N.Y. 10005

Charles M. Smith, Jr., R.A., Commissioner
248-8811

July 22, 1986

Mr. Jay A. Segal
Rosenman Colin Freund Lewis & Cohen
575 Madison Avenue
New York, New York 10022

Re: 108 East 96th Street, Manhattan
Block 1524, Lot 65
NB # 59/85

Dear Mr. Segal:

Following a thorough review of your response to Borough Superintendent George C. Sakona, dated July 21, 1986, in which you attempt to document conformance with applicable laws, I hereby revoke the approval of plans and permits for NB 59/85 to the extent that such approvals authorized construction above the 19th story. All other approvals and authorizations for work at and below the 19th story will remain in full force and effect pending submission of revised plans.

You state in your letter that approval of plans with respect to zoning only was originally granted by the Department of Buildings on August 12, 1985, based upon zoning map 6b published by the City Planning Commission, which first reflected the amendment of May 24, 1984, and which you assert showed the

Park Improvement Special Purpose District as extending to a depth of 100 feet along Park Avenue.

Notwithstanding your further assertion that the published map reflecting a 150-foot depth for the PI district was not available until some time in November, 1985, I have concluded that you have failed to demonstrate that the applicants have complied with the applicable provisions of the zoning resolution as lawfully adopted.

Therefore, the stop work order issued by Mr. Sakona on July 11, 1986, for all work above the 19th story shall continue in effect. You are directed to notify Borough Superintendent George Sakona as to the steps and measures that will be taken to secure the upper floors and to protect adjacent property. In addition, the applicants have thirty days in which to submit revised plans which conform with the zoning resolution.

Sincerely,

s/ Charles M. Smith, Jr.
Charles M. Smith, Jr.
Commissioner

cc: Park Capital Realty Corp.
Box 130
Forest Hills Station
Forest Hills, NY

Mr. Albert Ginsberg
c/o Plaza Realty Investors Corp.
64-35 Yellowstone Blvd.
Forest Hills, NY 11375

Mr. Vincent Bagoli
HRH Construction
909 Third Avenue
New York, NY 10022

Schuman, Lichtenstein, Claman & Efron
227 East 45th Street
New York, NY 10017

Appendix 7

Notice of Appeal to the Supreme Court of the United States, dated May 5, 1988, and filed May 6, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 23977/86

In the Matter of the Application of

PARKVIEW ASSOCIATES,

Petitioner,

For Judgment pursuant to CPLR Article 78

—against—

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondents,

—and—

CIVITAS CITIZENS, INC.,

Intervenor-Respondent.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioner, Parkview Associates, hereby appeals to the Supreme Court of the United States, pur-

suant to 28 U.S.C. § 1257(2), from the order of the Court of Appeals of the State of New York entered on February 9, 1988.

May 5, 1988

ROSENMAN & COLIN
Attorneys for Petitioner
575 Madison Avenue
New York, New York 10022
(212) 940-8800

To: CLERK OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

CLERK OF NEW YORK COUNTY
County Courthouse
60 Centre Street
New York, New York 10007

PETER L. ZIMROTH, ESQ.
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007

BERLE, KASS & CASE
Attorneys for Intervenor-Respondent
45 Rockefeller Plaza
New York, New York 10111

Appendix 8

Relevant Provisions of the Zoning Resolution of the City of New York (All emphasis is in original.)

§ 11-14 (Incorporation of Maps)

The location and boundaries of the districts established by this resolution are shown upon the zoning *maps*, which are hereby incorporated into the provisions of this resolution. The said *zoning maps* in their entirety, including all amendments thereto, shall be as much a part of this resolution as if fully set forth and described herein.

§ 11-22 (Applications of Overlapping Regulations)

Whenever any provision of this resolution and any other provisions of law, whether set forth in this resolution or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations over the *use* of land, or over the *use* or *bulk* of *buildings or other structures*, or *contain* any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern. In case of any conflict between the performance standards and the rules and regulations adopted by the Department of Environmental Protection, the more restrictive shall apply.

§ 12-01 (Rules Applying to Text of Resolution)

The following rules of construction apply to the text of this resolution:

(a) The particular shall control the general.

(b) In case of any difference of meaning or implication between the text of this resolution and any caption, illustration, summary table, or illustrative table, the text shall control.

(c) The word "shall" is always mandatory and not discretionary. The word "may" is permissive.

* * *

§ 12-10 (Definitions)

Words in the text or tables of this resolution which are *italicized* shall be interpreted in accordance with the provisions set forth in this Section.

* * *

"Zoning maps" are the maps incorporated into the provisions of this resolution in accordance with the provisions of Section 11-14 (Incorporation of Maps).

§ 76-11 (General Provision)

The district boundaries on the *zoning maps* shall be interpreted in accordance with the provisions set forth in Section 76-12 (Area Enclosed by District Boundary Line), Section 76-13 (Location of Boundary Line), and Section 76-14 (Additional Rules of Construction).

§ 76-12 (Area Enclosed by District Boundary Line)

An area enclosed by a district boundary line shall be in the district designated therein.

§ 76-13 (Location of Boundary Line)

The precise location of a boundary line is to be interpreted in accordance with the provisions set forth in this Section.

§ 76-131 (Boundary line parallel to the short dimension of block)

In cases where a boundary line extends parallel to the short dimension of the block [*i.e.*, in the present case, parallel to Park Avenue] and no dimensions are shown, such boundary line shall be considered to be located:

* * *

(c) In the case of all other districts, 100 feet from the nearest *street* within the district [*i.e.*, in the present case, 100 feet from Park Avenue].

§ 76-14 (Additional Rules of Construction)

§ 76-141 (When distance from street line shown)

In cases where the boundary line is shown by a dimension as being located a specific distance from a *street line*, this distance shall be considered to be measured from the nearest *street line* of the *street* from which dimensioned.

* * *

§ 92-06 (Special Height Limitation)

The maximum height of a *building* or *other structure* or portion thereof [in the Special Park Improvement District] shall not exceed 19 *stories* or 210 feet above *curb level*, whichever is less.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY L. BRAUN, being sworn, states:

1. I am and was at all material times a citizen of the United States, a resident of the City, County and State of New York, and a person over the age of 18 years. I am not a party to this proceeding.

2. I am a member of the law firm of Rosenman & Colin. My business address is 575 Madison Avenue, New York, New York 10022-2585.

3. On May 9, 1988, I served the within Jurisdictional Statement in this proceeding by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully pre-paid, in the United States mail at New York, New York, addressed as follows:

Peter L. Zimroth, Esq.
Corporation Counsel
100 Church Street
New York, N.Y. 10007

Robert S. Davis, Esq.
Berle, Kass & Case
45 Rockefeller Plaza
New York, N.Y. 10111

s/ Jeffrey L. Braun
Jeffrey L. Braun

Sworn to before me this
9th day of May, 1988

s/ Anita Lofaso
Notary Public—State of New York
No. 03-4755325
Qualified in Bronx County
(original signed)